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10 IN THE UNITED STATES BANKRUPTCY COURT
11 FOR THE DISTRICT OF ARIZONA

12 In re:) Chapter 11
13 BCE WEST, L.P., et al.,) **Case No. B-98-12547-ECF-CGC**
14) **through**
15) **Case No. B-98-12570-ECF-CGC**
16) **OBJECTION OF UNITED STATES**
17) **TRUSTEE TO MOTION FOR**
18) **AUTHORITY TO OBTAIN CREDIT AND**
INCUR DEBT SECURED BY SENIOR
19 Debtors.) **LIENS**

20
21 The United States Trustee for the District of Arizona
22 hereby objects to the Debtors' Motion for Authority to Obtain
23 Credit and Incur Debt Secured by Senior Liens [the "Motion"] for
24 the following reasons.

25 The Interim and proposed Final Order Approving Post-
26 petition Financing, which is Exhibit "A" ["Exhibit 'A'"] attached
27 to the above referenced Motion, provides for a "carve-out" in the
28 amount of \$3.5 million for payment of fees and expenses, with
certain exceptions, incurred by Debtors' counsel and counsel for

1 the Official Committee of Unsecured Creditors. See Exhibit "A"
2 page 11, paragraph 9 to page 12 attached to the Motion.

3 One of the exceptions to the payment of professional fees
4 in the carve-out provision is that the funds shall not be used to
5 prosecute or otherwise pursue any pre-petition or post-petition
6 claims or causes of action against the 1996 Lessor, pre-petition
7 revolver agent, pre-petition revolver lenders, pre-petition
8 liquidity agent, pre-petition liquidity lenders, common collateral
9 agent or their respective affiliates, or agents or lenders or their
10 respective affiliates.

11 By so restricting payments to the Debtors' counsel and
12 creditors' committee counsel, the post-petition lender seeks to
13 control not only the Debtors' actions, but also the actions of the
14 Official Committee of Unsecured Creditors. From a public policy
15 standpoint, such limitations on the use of funds loaned to the
16 Debtors post-petition are inappropriate and constitute overreaching
17 by the post-petition lender, particularly when one considers the
18 Debtors' inability to obtain financing elsewhere. Consequently,
19 it should not be approved by the Court.

20 Sections 361 and 364 of the Bankruptcy Code provide
21 sufficient protection for post-petition lenders. In fact, the
22 lenders herein are receiving a super-priority lien for a revolving
23 line of credit up to \$70 million in cases where the assets have a
24 book value of \$1.8 billion.

25 In essence, the Debtors' hands are tied because of the
26 need for financing. Debtors' counsel must abide by their client's
27 decisions concerning the objectives of representation. See ER 1.2.

1 The decision in these cases to agree to the limitations referred
2 to above was made under economic duress.

3 In effect, the post-petition lender is interfering with
4 the attorney/client relationship that exists among both the Debtors
5 and Debtors' counsel, and the Official Committee of Unsecured
6 Creditors and its counsel. It is attempting to direct the scope
7 of the representation provided to the Debtors and the committee.
8 This situation may violate Ethical Rule 5.4(c), which provides that
9 "A lawyer shall not permit a person who . . . pays the lawyer to
10 render legal services for another to direct or regulate the
11 lawyer's professional judgment in rendering such legal services."
12 The lenders' counsel has indicated that it does not wish to fund
13 litigation against itself. If use of the carved-out funds for
14 litigation against the lenders is considered funding that
15 litigation, as opposed to merely a loan to the Debtors to
16 reasonably use as necessary as Debtors in Possession, ER 5.4(c) may
17 very well be applicable.

18 The ER 5.4(c) argument is stronger when one considers the
19 limitations placed on the legal representation provided to the
20 committee, an entity that had no ability to participate in the
21 negotiations leading to the proposed post-petition financing
22 agreement.

23 WHEREFORE, the United States Trustee respectfully
24 requests that the Court deny the Motion for Authority to Obtain
25 Credit and Incur Debt Secured by Senior Liens to the extent that
26 the use of the carve-out funds shall not be used to prosecute or
27 otherwise pursue any pre-petition or post-petition claims or causes
28

1 of action against the 1996 Lessor, pre-petition revolver agent,
2 pre-petition revolver lenders, pre-petition liquidity agent, pre-
3 petition liquidity lenders, common collateral agent or their
4 respective affiliates, or agents or lenders or their respective
5 affiliates.

6 RESPECTFULLY SUBMITTED this 21st day of October, 1998.

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8 BRENDA MOODY WHINERY
United States Trustee
District of Arizona

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10 \s\

11 RICHARD J. CUELLAR
Attorney Advisor
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13 Copies of the foregoing mailed this
14 21st day of October, 1998, to:

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